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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-365

CITIZENS UTILITIES COMPANY AND CITIZENS UTILITIES COMPANY OF CALIFORNIA,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY; BELL TELEPHONE COMPANY OF NEVADA,
Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Respondents' brief in opposition to the petition for certiorari mischaracterizes Petitioners' arguments and the decisions of the courts below.

First, Respondents note that Judge Harris gave the parties the option of "a trial before a magistrate or the assignment of a new judge," but then Respondents state at page 6 of their brief that,

> "Petitioner's counsel informed the Court on March 12 that he could not respond to the problem."

Petitioners' counsel made no such statement. His only relevant comment, made *after* Respondents refused to proceed with a Magistrate's trial, was that Petitioners' case was ready for trial "whether to master or to Your Honor." Record at 339.

Respondents' claim that Petitioners' dispute with their original counsel delayed the trial of this case is the precise claim that provoked Judge Carter to state that Respondents' counsel "deliberately misled Judge Ferguson . . . ." Petition at A-11, n.2.

Respondents compound this inaccuracy with another on page 11 of their brief:

> "What the record actually establishes is that petitioners always had the power to bring the case to trial, had they so desired and had they acted. For example, when a judge was requested to hear Mr. Alioto's motion for leave to withdraw and for an order fixing attorneys' fees . . . , Judge Battin was promptly designated . . . ."

Yet the record clearly shows that Judge Battin was appointed only for the limited purpose of presiding over the fee dispute. Respondents' statement conveniently ignores Chief Judge Chambers' statement in appointing Judge Battin that,

> "It would take a little longer to find a trial judge [for the] long trial." Record at 568, Exhibit C.

The uncontested record thus shows that Respondents forced the case off calendar by refusing trial before a Magistrate *before* Petitioners' dispute with counsel was announced to the court.

In short, Petitioners' dispute with their original counsel was totally irrelevant to this delay, and it is misleading for Respondents repeatedly to claim otherwise.

Second, on pages 2 and 9 of their brief Respondents inexplicably contend that the district court "found" procrastination by Citizens, and on page 9 of their brief Respondents contend that the Court of Appeals "held" that "finding" to be "sufficient."

The district court made so such finding. Respondents utilize Judge Ferguson's off-hand comments at the hearing, which are irrelevant in view of the language of his subsequent order:

> "Here we do not have a single 16 year spell of inaction, but rather spaces throughout the course of the litigation where procrastination, for whatever reason, slowed proceedings. *Plaintiffs have an obligation to press forward with litigation, even if defendants in part slow their progress.* They failed to do that here. Petition at B-2 (emphasis added).

Both courts below failed to evaluate the respective roles of plaintiffs, defendants, and the court in delaying the prosecution of the case as required by this Court's decision in *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962).

Respondents further claim to have suffered prejudice as a result of the long delay. Respondents' Brief at 1-2. But Respondents may not rely on delay for which they were largely responsible (see Petition at pp. 18-19). Further, if there was any prejudice to Respondents, it occurred before Respondents stipulated to trial dates on March 5, 1973, and again on March 18,

1974. Having so stipulated, Respondents cannot properly rely on alleged prejudice that occurred prior to their stipulation (see Petition at pp. 14-15).

Finally, Respondents contend at page 12 of their brief that Citizens' principal argument rests upon an "inexplicable" misquotation from the Fifth Circuit's decision in *Durham* v. *Florida East Coast Ry.*, 385 F.2d 366 (5th Cir. 1967), in which Citizens' petition uses the word *"and"* instead of *"or"*. We regret the typographical error, but the conjunction is irrelevant to Citizens' arguments. Neither the district court nor the circuit court found either a "clear record of delay" by Citizens *or* any "consumacious conduct" (indeed, none was even alleged).

Accordingly, Citizens' petition for certiorari to the Court of Appeals for the Ninth Circuit should be granted.

Dated: October 11, 1979

By _____
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